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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Petition shows the critical importance of the issue this Court reserved in *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 n.5 (1987), to the federal statute that prohibits state tax discrimination against railroads, section 11503 of Title 49. The decision below seized on that issue to create an expansive exception to the statute, and that exception has already spread to other lower courts. The Virginia Tax Commissioner and the respondent Virginia localities (the "Localities") have in no way justified the Fourth Circuit's decision or the severe damage it will cause. Review by this Court is necessary to arrest that harm and to preserve the integrity of the remedial scheme Congress adopted.

I.

The question reserved in *Oklahoma Tax Commission*, and presented by the Petition, is straightforward. It is *not*, as Respondents suggest, whether a single methodology for valuing railroad property is mandated by the statute or is necessarily superior to all others. *See, e.g.*, Virginia Tax Commissioner's Brief ("VTC Br.") at 2; Localities' Brief ("Loc. Br.") at 1-2, 4-12. Rather, the question is whether a state's selected valuation methodology, even if uniform on its face, nonetheless violates section 11503 if it overvalues railroad property compared to other commercial and industrial property in that state. *See Oklahoma Tax Commission*, 481 U.S. at 463 n.5; Petition ("Pet.") at i, 13-16.

While the facts in *Oklahoma Tax Commission* did not present this issue, it was recognized even then as a question of potentially critical importance. *See* Pet. at 15-16. It was also addressed by the United States in its brief supporting certiorari in that case, which observed that the statute "prohibits *any* overvaluation of railroad property that results from an assessment rule or methodology that *—either on its face or as applied—*systematically determines excessive values for railroad property."[1] After *Oklahoma Tax Commission* held that section 11503 prohibits discriminatory overvaluation of railroad property, methodology-based discrimination quickly came to the fore. *See* Pet. at 6-7, 21-24.

Respondents strain to paint the issue differently. Shifting their focus from the inescapable proposition that a methodology may produce discriminatory effects—which even they concede—respondents pose a false question: whether there must be a single federally-mandated methodology for valuing railroad property. *See, e.g.*, VTC Br. at 2; Loc. Br. at 6-12.

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[1] Brief for the United States as Amicus Curiae in Support of Petitioner at 11, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986) (emphasis added).

Petitioners do not advocate such a single methodolgy, nor will such uniformity be an inevitable consequence of permitting methodology-based discrimination to be challenged. Petitioners have never claimed—nor do they now —that section 11503 requires a state to use any specific valuation methodology. They have only sought the opportunity to show the discriminatory effect of Virginia's "inventory and summation" methodology by using other, widely-accepted valuation techniques to test whether Virginia's methodology actually yields the "true market value" of railroad property. The Tax Commissioner concedes that there are "many accepted methods of determining the fair market value of land . . . and that more than one method often is used to estimate the fair market value of specific property at any given time." VTC Br. at n.4.[2] Respondents' claims that petitioners seek to impose a "unit" methodology are wrong and avoid the issue presented by the Petition.

All petitioners seek is the opportunity to show at trial that the particular methodology employed by Virginia in fact overvalues railroad property compared to other commercial and industrial property. Such discriminatory overvaluation is precisely what *Oklahoma Tax Commission* condemned, and nothing in the statute suggests that such

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[2] The Localities likewise acknowledge that there is no single "unit method," and that the term is applied to a number of distinct valuation methodologies. *See* Loc. Br. at 11 n.10. *See also* Pet. at 18 n.20. In any event, they are far off the mark in suggesting that the use of a "unit" method to test fair market value is somehow improper or inconsistent with section 11503. *See* Loc. Br. at 8. As they themselves concede, Congress was well aware that most states were using "unit" methodologies at the time it enacted section 11503. Loc. Br. at 12. Moreover, Congress fully accepted such approaches as measures of "true market value." *See* S. Rep. No. 445, 87th Cong., 1st Sess. 454 (1961). That fact also disposes of the Localities' argument that it is somehow improper to test valuations of railroad property under Virginia's methodology by comparing them to valuations that "unit" methodologies would yield. *See* Loc. Br. at 10.

discrimination should be immunized merely because it is inherent in the methodology employed. *See* Pet. at 13-18.[3] None of the arguments offered by the Fourth Circuit, or by respondents here, justifies the creation of such a safe harbor for discrimination.

II.

Respondents not only pose the issue wrongly. They also seek to obscure it with diversionary arguments. Respondents devote much of their briefs to defending Virginia's chosen taxing scheme. But whether the Virginia approach discriminates is an issue on the merits, one that can be addressed if—but only if—the Fourth Circuit is reversed and petitioners are given the opportunity to challenge that methodology under section 11503.[4]

In any event, the arguments in defense of Virginia's methodology are unpersuasive. The suggestion that Virginia's methodology cannot result in prohibited discrimination because both Virginia law and section 11503 speak in terms of "market value" (*e.g.*, Loc. Br. at 7-8) "ig-

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[3] The Localities' contention that section 11503 applies to discrimination that results from a methodology that "single[s] out railroad property for special treatment," but not to one that achieves its discriminatory effect in a less overt way (Loc. Br. at 12-13) finds no support in the statute and cannot be squared with *Oklahoma Tax Commission*.

[4] There is plainly no merit to the Tax Commissioner's claim that respondents were entitled to the summary judgment granted by the district court because "[p]etitioners failed to introduce competent evidence establishing any disputed facts" (VTC Br. at 11). While the district court found that there were no "genuine issues of material fact," that finding was based solely on the court's belief that "[e]xpert opinions are not sufficiently conclusive to create a factual issue" (Appendix to Petition ("App.") 13a). This was not relied on by the Fourth Circuit as a basis for its decision, and in any event is wrong as a matter of law. *See, e.g., Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985); *Sears Roebuck & Co. v. General Servs. Admin.*, 553 F.2d 1378, 1381-83 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977).

nore the ancient wisdom that calling a thing by a name does not make it so." [5] Respondents also ignore the Virginia Supreme Court's admission that the state's fair market value rule is honored more in the breach than the observance.[6]

Nor have respondents shown that Virginia's "inventory and summation" methodology for determining "fair market value" is incapable of resulting in discrimination against railroad property. Their analogy between the use of that methodology here and the use of sales of "comparable" land to value ordinary commercial and industrial property is a false one.[7] Indeed, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Railroad operating property is unquestionably different from the property of other commercial and industrial enterprises. Once dedicated to rail service, it must in most instances continue to be used for that purpose, and rail service over that property can be ended only if strict regulatory standards for abandonment are met. *See* 49 U.S.C. § 10903 (1988). While a parcel of commercial or industrial property may readily be used for the same purpose as property that lies "across-the-fence" from it, a

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[5] *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976).

[6] *Richmond, F. & P. R.R. Co. v. State Corp. Comm'n*, 219 Va. 301, 306, 247 S.E.2d 408, 411 (1978) (citing *Southern Ry. v. Commonwealth*, 211 Va. 210, 214, 176 S.E.2d 578, 581 (1970) and *Washington County Nat'l Bank v. Washington Co.*, 176 Va. 216, 218, 10 S.E.2d 515, 516 (1940)).

[7] As the Petition explains, Virginia does not in fact apply the same methodology to railroad property as to other commercial and industrial property, but instead follows a hybrid approach that assumes that the "highest and best use" of railroad property is necessarily a *non*-rail use and then adds the value of rails and ties to that non-rail value. *See* Pet. at 7.

railroad right-of-way cannot.[8] This is, in fact, why "railroad property is not widely sold." Loc. Br. at 9. And when sales do take place, they are most often to other parties that must continue to conduct rail operations over the property, subject to the same restrictions.

In sum, respondents' arguments fail to prove that Virginia's chosen methodology does not discriminatorily overvalue railroad property. Those arguments are at most ones that could be weighed, together with opposing ones, if the railroads were given the opportunity that section 11503 affords them to show that Virginia's methodology yields forbidden discriminatory overvaluation.

While the Tax Commissioner's brief pursues a different tack, his arguments fare no better. They are in the main pleas of avoidance: collateral estoppel, comity and abstention. VTC Br. at 14-22. But the Fourth Circuit expressly noted that "[n]o issues of collateral estoppel appear to have been raised." App. 4a n.2. There was not even any mention of comity or abstention in the proceedings below, and those arguments thus cannot be properly raised before this Court.[9]

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[8] In an effort to obscure these facts, the Localities portray the sale of land that was formerly within petitioner Richmond, Fredericksburg & Potomac Railroad Company's Potomac Yard as proof that railroad operating property has the same value as adjacent commercial real estate. *See* Loc. Br. at 8-9 & n.8. The effort to portray Potomac Yard as the paradigm of railroad operating property in Virginia fails on its own terms. Even at the 420-acre size used by the Localities (Loc. Br. at 9 n.8), the entire yard would, at the standard right-of-way width of 100 feet, be comparable only to a 35-mile line of railroad—roughly the distance from the Potomac River railroad bridge at Washington, D.C. to Quantico, Virginia. There are, by contrast, over 3,000 miles of railroad lines in Virginia. *See* Rand McNally Handy Railroad Atlas at 61 (1988). There are over 175,000 miles of rail lines in the Nation as a whole. *See* Association of American Railroads, Railroad Facts at 3 (1991).

[9] *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (alternative ground for affirmance must be properly raised below); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 n.17 (1980) (same).

More important, the Tax Commissioner's arguments cannot bar a claim under section 11503. There plainly is no basis for collateral estoppel here.[10] As to abstention, the only court of appeals ever to order it in a section 11503 case vacated its abstention order on rehearing after this Court's decision in *Oklahoma Tax Commission*, implicitly recognizing that abstention could not be reconciled with that decision. *Atchison, T. & S.F. Ry. v. Board of Equalization*, 828 F.2d 9, 10 (9th Cir. 1987), *vacating* 795 F.2d 1442 (9th Cir. 1986).[11] And *Oklahoma Tax Commission* itself squarely rejected arguments based on comity, observing that

> [t]hese are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

481 U.S. at 464.

III.

Respondents display a telling reluctance to defend the Fourth Circuit's decision on its own terms or to confront its inconsistency with this Court's decision in *Oklahoma*

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[10] The state court litigation the Commissioner cites only determined that a "unit" methodology was not authorized by Virginia law. *See, e.g., County Bd. v. Commonwealth*, 240 Va. 108, 113-14, 393 S.E.2d 194, 197 (1990). The issue under section 11503, by contrast, is whether the methodology actually used by Virginia—or any other state—produces discrimination that is prohibited by federal law. There plainly was no occasion for the railroads to raise the latter issue in the state court litigation, where the *Localities* were challenging the Tax Commissioner's use of a methodology that did *not* discriminate against railroad property.

[11] The United States argued in *Oklahoma Tax Commission* that the Ninth Circuit's abstention ruling was "incorrect, and that holding in some circumstances could have much the same practical effect on railroads as the Tenth Circuit's erroneous ruling as to jurisdiction [with respect to overvaluation claims] here." Brief for the United States as Amicus Curiae in Support of Petitioner at 12, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986).

Tax Commission. The Tax Commissioner's brief dwells on issues the Fourth Circuit neither decided nor addressed, and falls back on a variety of assertions that go to the merits of the controversy. The Localities do little more to support the Fourth Circuit's reasoning. Recognizing that the decision below lacks substance on its own terms, they look instead to the district court decision on which the Fourth Circuit largely relied, *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543 (D. Utah 1988). As petitioners have shown, however, *Union Pacific* only serves to make more evident that a "methodology" exception cannot be reconciled with the statutory language, its legislative history or this Court's decision in *Oklahoma Tax Commission*. *See* Pet. at 18-19 & n.22.

What is even more telling is respondents' inability to square the Fourth Circuit's reasoning with *Oklahoma Tax Commission*. They completely ignore the Court's analysis of the statute's terms and the tasks Congress has assigned to the federal courts in applying it, including the independent determination of true market values.[12] Indeed, the Tax Commissioner does not even cite *Oklahoma Tax Commission*, let alone attempt to reconcile the decision below with it.

IV.

The hole the Fourth Circuit has opened in section 11503 affects not just petitioners but railroads—and therefore shippers and consumers—across the Nation. As the Association of American Railroads explains, the risks of discriminatory taxation are grave and the stakes large.[13] In light of the long history of discriminatory state taxes on railroads—and the pressing financial problems of states and localities today—the Fourth Circuit's

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[12] As the Court concluded, in order to apply section 11503, "it is necessary to determine what the 'true market values' are." *Oklahoma Tax Commission*, 481 U.S. at 461.

[13] *See* Brief Amicus Curiae of the Association of American Railroads in Support of Petitioners at 13-15.

decision is a seductive invitation to develop discriminatory property tax methodologies. *See* Pet. at 11-13, 24.

The Localities concede the possibility of such discriminatory methodologies, but suggest that any "regulatory gap" the decision below might create can be addressed under the Equal Protection Clause of the Fourteenth Amendment. Loc. Br. at 12-13 & n.11. That suggestion only serves to underscore the violence the Fourth Circuit has done to the statute, for it was largely because constitutional remedies had not dealt adequately with the problem of state tax discrimination against railroads that Congress enacted section 11503.[14]

As petitioners have shown, states have sought relentlessly to devise means of shifting tax burdens from resident voters to railroads whose property is essentially immovable from the jurisdiction. *See* Pet. at 3-7, 11-12. Even after section 11503's enactment, states have tried to find some angle, some new mechanism, for continuing to impose discriminatory tax burdens on railroads. Faced with their own fiscal demands and voter opposition to tax increases, states will not be blind to what the decision below offers.

It will not do to say that there will be time enough to repair the harm to section 11503 and the railroads once methodological discrimination is rampant. *See* Loc. Br. at 14. The Fourth Circuit's faulty reasoning has already taken root elsewhere, and promises to engender a good deal more litigation. *See* Pet. at 13, 21-24. And although it purports to avoid methodological inquiries altogether, the Fourth Circuit's rule invites confusion in distinguishing "methodology" from "application," confusion that has already begun to vex the lower courts. *See id.* at 19-21.

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[14] *See* Pet. at 21 n.24. Indeed, two members of this Court counseled the need for a statute, such as section 11503, containing specific standards and mechanisms for curbing such discrimination. *Id.*

In these circumstances, with the harms that will be caused by the Fourth Circuit's decision already evident and with the risk to the statute severe, there is every reason for prompt review by this Court.

CONCLUSION

For these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

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